

**FILED**

**JUN 6 2006**

**CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS**

**NOT FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

ALEJANDRO MARTINEZ-PULIDO,

Petitioner - Appellant,

v.

MICHAEL CHERTOFF, et al Secretary of  
the Department of Homeland Security,

Respondents - Appellees.

No. 05-55826

D.C. No. CV-04-01798-LAB/JFS

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the Southern District of California  
Larry A. Burns, District Judge, Presiding

Argued and Submitted May 4, 2006  
Pasadena, California

Before: LAY<sup>\*\*</sup>, KLEINFELD, and SILVERMAN, Circuit Judges.

Alejandro Martinez-Pulido appeals the denial of his habeas petition  
challenging a final order of deportation. After his habeas petition was denied,

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<sup>\*</sup> This disposition is not appropriate for publication and may not be  
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The Honorable Donald P. Lay, Senior United States Circuit Judge for  
the Eighth Circuit, sitting by designation.

section 106 of the REAL ID Act of 2005 removed jurisdiction over habeas petitions of this sort, directed the transfer of any petition pending in the district court to the courts of appeal, and directed the courts of appeal to treat them as direct petitions for review from the agency.<sup>1</sup> Martinez-Pulido's petition had already been decided by the district court but no notice of appeal had yet been filed, but we have elected to exercise jurisdiction in similar cases and treated the petitions as direct petitions for review.<sup>2</sup> We thus have jurisdiction to review Martinez-Pulido's case and treat it as a petition for review from the BIA.

Martinez-Pulido relies on the unconscionability rule set forth in Singh v. INS,<sup>3</sup> but the government argues that the relief was a certainty in Singh and the hearing was only a formality.<sup>4</sup> The government argues that Martinez-Pulido's failure to appear at his hearing is thus fatal because he cannot show "exceptional circumstances."<sup>5</sup>

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<sup>1</sup> See REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231, § 106(c).

<sup>2</sup> See Alvarez-Barajas v. Gonzales, 418 F.3d 1050, 1053 (9th Cir. 2005).

<sup>3</sup> See Singh v. INS, 295 F.3d 1037 (9th Cir. 2002).

<sup>4</sup> See Valencia-Fragoso v. INS, 321 F.3d 1204, 1205-06 (9th Cir. 2003).

<sup>5</sup> 8 U.S.C. § 1229a(b)(5)(C)(i).

But this is not a failure to appear case. Martinez-Pulido did appear, but was denied entry to the hearing. This case is therefore analogous to Romani v. I.N.S.<sup>6</sup> The statute only requires an alien to show exceptional circumstances to excuse a failure to appear. Because Martinez-Pulido did appear, he does not need them. The BIA thus abused its discretion in denying Martinez-Pulido's motion to reopen, and Martinez-Pulido is due an opportunity to appear at his hearing.

**PETITION GRANTED.** We **REMAND** so that Martinez-Pulido may have his petition for 212(c) relief considered on the merits.

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<sup>6</sup> Romani v. INS, 146 F.3d 737, 739 (9th Cir. 1998).